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Nos. 83-943, 83-1030, and 83-1119

In the Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

RYDER TRUCK LINES, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

JOHN BROADLEY
General Counsel
ROBERT S. BURK
Deputy General Counsel
LAWRENCE H. RICHMOND
Deputy Associate General Counsel
Interstate Commerce Commission
Washington, D.C. 20423

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Interstate Commerce Commission's revised policy for deciding if particular leasing arrangements constitute regulated or exempt motor carriage is consistent with the Interstate Commerce Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 59a-93a)[1] is reported at 716 F.2d 1369. The decision of the Interstate Commerce Commission (Pet. App. 1a-58a) is reported at 132 M.C.C. 756.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1983. The petition for a writ of certiorari in No. 83-943 was filed on December 7, 1983, the petition in No. 83-1030 was filed on December 22, 1983, and the petition in No. 83-1119 was filed on January 6, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since the enactment of the Motor Carrier Act of 1935, ch. 498, 49 Stat. 543 *et seq.* (now codified, as amended, at 49 U.S.C. (Supp. V) 10101 *et seq.*), the Interstate Commerce Commission has had regulatory authority over motor transportation "for-hire." On the other hand, "private carriage" (*i.e.*, transporting one's own goods) has been exempted from regulation. Because the Act defines these two types of transportation in general terms,[2] the Commission has had the difficult task of establishing a precise boundary between them. The Commission has had particular difficulty drawing this distinction in cases involving shippers that transport their goods with vehicles and

[1] "Pet. App." refers to the appendix to the petition in No. 83-943.

[2] See 49 U.S.C. (Supp. V) 10102(12), (13) and (14). The original 1935 Act did not provide a substantive definition of private carriage (Pet. App. 61a).

drivers leased from a single source. The problem arises because single source leases resemble for-hire carriage in that the shipper pays a non-employee to transport its goods in vehicles the shipper does not own.[3]

The Commission first addressed the problem in *H. B. Church Truck Service Co.—Com. Car. Application*, 27 M.C.C. 191 (1940). There, two shippers leased trucks and drivers from Church. In addition to providing the trucks and drivers, Church also painted the trucks to the shippers' specifications, maintained the vehicles, paid all operating expenses, and carried public liability and property insurance. Acknowledging the difficulty of drawing the lines between for-hire and private carriage in these circumstances, the Commission said that the key test of private carriage was whether the shipper had the right to "control, direct, and dominate the performance of the service." 27 M.C.C. at 195. Because the Commission found that the public interest (as embodied in the Motor Carrier Act of 1935) required diligence to prevent evasion of regulation through subterfuges, it decided to implement its "control" test by creating a rebuttable presumption of for-hire carriage when a shipper leases trucks and drivers from a single source. The presumption would yield "to a showing that the shipper has the exclusive right and privilege of directing and controlling the transportation service, as,

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[3] The Commission has consistently found that leases to shippers of trucks and drivers from separate sources do not constitute for-hire carriage. *Rittenhouse—Investigation of Certificate*, 78 M.C.C. 389 (1958); *Cummings Truck Lease, Inc., Investigation of Operations*, 81 M.C.C. 283 (1959); *Personnel Service, Inc.—Investigation*, 110 M.C.C. 695 (1969).

for example, if the equipment were operated by the shipper's employee" (27 M.C.C. at 196).

The Commission subsequently refined its single source lease policy in *Pacific Diesel Rental Co.—Investigation of Operations*, 78 M.C.C. 161, 172 (1958). In that case, the Commission articulated an alternative version of the "control" test by asking whether the lease operations were "in substance" for-hire carriage. This "substance" test, which simply called for an examination of all the circumstances surrounding a particular operation, evolved into a separate and additional test when the Commission addressed another particular leasing arrangement in *Oklahoma Furniture Mfg. Co.—Investigation of Operations*, 79 M.C.C. 403, 409-410 (1959).

The owner-operators of the leased vehicles in *Oklahoma Furniture* became employees of the shipper, and their leases made them responsible for all operating costs and the risk of loss of the equipment. The shipper maintained the equipment, complied with safety regulations, provided public liability and cargo insurance, and reserved the exclusive right to direct and control the operations. Nevertheless, the Commission —applying a new presumption—concluded that the arrangement constituted for-hire carriage. The Commission found that the shipper did not in fact have exclusive control because "[t]here is present, whenever the owner-operator drives his own equipment, the right and power of the lessor to defeat any supposed right to control that the shipper-lessee may believe exists." 79 M.C.C. at 411. Given this apparent absence of exclusive control, the Commission found the operation to be for-hire carriage because the owner-operators provided and maintained the equipment, guaranteed a fixed cost of transportation, bore

the risks of delays and breakdowns, and met all costs of operation, whereas the shipper only paid for insurance and exercised some control over the owner-operators.

A three-judge district court reversed the Commission. *Drum* v. *United States*, 193 F. Supp. 275 (W.D. Okla. 1960). In *United States* v. *Drum*, 368 U.S. 370 (1962), however, this Court reversed the district court and upheld the Commission's decision. Noting that the Commission has traditionally been obliged to draw the line between for-hire and private carriage, the Court held that the statutory definitions of private and for-hire carriage required that "a purported private carrier who hires the instrumentalities of transportation from another must—if he is not to utilize a licensed carrier—assume in significant measure the characteristic burdens of the transportation business." 368 U.S. at 374-375. The Court endorsed the Commission's "control" and "substance" test for determining if those burdens had been assumed (*id.* at 384), and it affirmed the Commission's conclusion that the owner-operators qualified as for-hire carriers because they had assumed such "characteristic burdens" as large capital investment, risk of increases in variable costs and risk of loss or non-utilization of the high-priced equipment. *Id.* at 379-380. The Court made it clear, however, that it was affirming an exercise of agency discretion, and was not itself drawing the line between regulated and exempt carriage (*id.* at 384, 385); indeed, the Court explicitly criticized the district court for attempting to substitute its judgment for that of the agency. *Id.* at 385-386.

Following *Drum*, the Commission continued to develop its approach to single source leasing by applying the "control" and "substance" test to particular

single source leasing arrangements. Shortly after this Court's *Drum* decision, the Commission, in *Lovell—Investigation of Operations*, 92 M.C.C. 728 (1963), redefined the "characteristic burdens" of transportation by deemphasizing the financial risks the Commission had considered critical in *Drum*, focusing instead on issues of control and responsibility. 92 M.C.C. at 734-736. Applying this modified analysis, the Commission found that the single source lease in question created exempt private carriage. In two other post-*Drum* cases, *Rayette, Inc.—Investigation of Operations*, 108 M.C.C. 410 (1969) and *Ontario Co.—Declaratory Order*, 112 M.C.C. 211 (1970), the Commission applied a similar analysis and found that the arrangements constituted private carriage.[4]

In sum, prior to 1980 the Commission exempted from regulation single source leasing by private carriers only if all of the circumstances showed that the operation, in substance, was not a for-hire transportation service provided by an unlicensed carrier. The most significant elements of the policy were its presumptions (1) that single source leasing constituted for-hire carriage; and (2) that an owner-operator was capable of exerting ultimate control over the transportation service (and thus would be deemed to be providing for-hire carriage) unless he became the shipper's employee.

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[4] Courts have also considered single source leases in enforcement actions (brought directly by the Commission or at the Commission's request), in actions to review Commission leasing decisions, and in tax cases. The courts generally have applied the Commission's "control" and "substance" test, finding for-hire carriage whenever the arrangement in question imposed no more burdens on a shipper than those normally involved with contract carriage.

2. In July 1980, Congress enacted the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 *et seq.* The new Act ended the 1935 Act's protective policy toward regulated carriers. In addition, it permits private carriers to engage in compensated intercorporate hauling among wholly-owned members of a corporate family. 49 U.S.C. (Supp. V) 10524(b) and (c). The Act also aids owner-operators by expanding the number of commodities they may haul without a license (49 U.S.C. (Supp. V) 10526(a)(6), (11), (12) and (13)), and by permitting owner-operators to obtain ICC authority to haul food under a simplified licensing standard. 49 U.S.C. (Supp. V) 10922(b)(4)(E).

The new Act's reduced concern for protecting regulated carriers' traffic against competition, and its grant of increased flexibility to private carriers, prompted the Commission to consider modifying the single source leasing policy it had developed to implement the 1935 Act. In a proceeding styled *Ex parte No. MC-122 (Sub-No. 2)*, the Commission proposed a return to the original control test articulated in *H. B. Church, supra*, with control being measured by the same control criteria used to govern owner-operator leasing to for-hire carriers.[5] A variety of interested parties, including owner-operators, regulated carriers, shippers (many operating private truck fleets), associations of shippers and carriers, and the United

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[5] Regulated carriers can lease drivers and vehicles from a single source under Commission regulations. 49 C.F.R. 1057. One of the requirements is that the regulated carrier control the service to the same extent as if he owned the vehicles, although he needs to control the vehicles only to the extent necessary to be responsible to the shipper, the public, and the Commission (Pet. App. 34a).

States Department of Transportation filed comments. Petitioners Ryder Truck Lines, Inc. (Ryder), American Trucking Associations, Inc., et al. (ATA), and National Association of Regulatory Utility Commissioners (NARUC) opposed any change in policy.

In March 1982, the Commission issued a policy statement articulating a revised policy toward single source leasing (Pet. App. 1a-58a). Under the new policy, as under the old, the Commission will examine all of the circumstances surrounding a lease arrangement to ascertain whether the shipper is bearing the "characteristic burdens of transportation" and to determine if the lessor is offering what is in substance a complete transportation service. The Commission redefined the "characteristic burdens of transportation," however, to be the control, responsibility, and management burdens necessary to make trucks and drivers part of a functioning private transportation operation. In addition, the Commission eliminated the presumption that all single source leases constitute for-hire carriage and abandoned its earlier position that an owner-operator must become the shipper's employee before a single source lease arrangement would be considered private carriage.

The Commission reduced its new policy to six requirements, which, if accurately reflected in actual lease operations, would raise a rebuttable presumption that the operation constitutes private carriage.[6] The six requirements are (Pet. App. 34a-37a):

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[6] To reduce uncertainty about future lease arrangements, the Commission provided sample lease language incorporating the six minimum criteria, and stated that a lease containing the sample language would raise a rebuttable presumption that the arrangement is private carriage (Pet. App. 57a-58a).

(1) exclusive commitment of the equipment to the shipper's use for the term of lease;

(2) exclusive shipper dominion and control over the transportation service during the lease term;

(3) assumption by the shipper of responsibility to the public for injury caused during performance of the transportation service;

(4) complete shipper responsibility for compliance with safety regulations;

(5) shipper responsibility for cargo loss; and

(6) a minimum lease term of 30 days.

The Commission also listed ten additional factors that it would consider relevant, but not controlling, on the issue whether the shipper has assumed the degree of control necessary to turn a single source lease into true private carriage.[7]

3. The court of appeals affirmed the Commission's decision in all respects (Pet. App. 59a-95a). Although the Commission had rejected further use of its previous presumptions, the court recognized (*id.* at 67a) that, in essence, the Commission had only reformulated the criteria to be applied in determining whether particular lease arrangements are private or for-hire carriage. Thus, the Commission had retained

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[7] These additional factors are whether: (1) the lease is written; (2) the lease is for round trips; (3) the driver becomes the shipper's employee; (4) the vehicle is sometimes driven by someone other than the owner-operator; (5) the lease covers both tractors and trailers; (6) the shipper assumes the risk of the equipment's loss; (7) the private carrier shipper pays for fuel, tolls, etc.; (8) the lessor must repair and maintain the equipment; (9) the lease provides for a minimum payment regardless of use; and (10) the shipper is helping to finance purchase of the equipment (Pet. App. 37a-40a).

its traditional test of control and it remained free under this test to decide each case in light of actual operations and all the relevant facts (*id.* at 69a, 73a, 78a, 81a).

The court of appeals held that the Commission could reformulate the criteria for distinguishing for-hire from private carriage because there was no indication that Congress in the Motor Carrier Act of 1980 intended to restrict the Commission to the definitions and presumptions applied in the past (Pet. App. 75a-76a). The court also held that this Court's *Drum* decision did not require the agency to continue using either the rejected presumptions or the previously defined "burdens." To the contrary, the court of appeals held (Pet. App. 77a) that "[o]verall, * * * the [*Drum*] opinion reflects a deference to the Commission's informed judgment as to what types of burdens are characteristic of the provision of for-hire transportation." Because the Commission's rejection of the old presumptions only indicated its new views as to which burdens constitute significant indicia of private carriage, the court of appeals found that the Commission had acted within the limits of its authority (Pet. App. 78a).

Having held that the Commission could revise its single source leasing policy, the court of appeals held that the new policy has a rational basis. The court relied upon the Commission's obligation to reexamine its policies in light of changed circumstances (Pet. App. 89a), and it noted that the Commission here reasonably cited changes in both the Motor Carrier Act and the motor carrier industry to justify its new position (Pet. App. 80a-81a). The court agreed with the Commission's conclusion that entry into regulated carriage is now far easier than it was under the old

Act, and that, accordingly, the danger of evasion of regulation was much reduced. The court also found that the new National Transportation Policy, as modified by the 1980 Act, supports the Commission's new policy, which should foster greater competition within the regulated industry for the services of owner-operators (Pet. App. 89a-90a), and should result in a healthier motor carrier industry.

Finally, the court of appeals rejected petitioners' claims that the new policy would inevitably result in an impermissible blurring of the line between for-hire and private carriage (Pet. App. 91a). Instead, the court held that individual enforcement proceedings are the appropriate forum for ensuring that the Commission actually applies the new policy in a manner consistent with the statutory differences between for-hire and private carriage (*ibid.*).[8]

ARGUMENT

The court of appeals correctly held that the Commission's new policy—which has not yet been applied[9] and thus must be tested on its face—is consistent with the Motor Carrier Act and with this Court's decision in *United States* v. *Drum*, *supra*. Because the decision below creates no conflict among the circuits, and because there is ample opportunity for judicial review of concrete applications of the new policy, review by this Court is unwarranted.

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[8] The court of appeals also held (Pet. App. 92a-93a) that the new policy was formulated in compliance with the National Environmental Policy Act, 42 U.S.C. (& Supp. V) 4321 *et seq.*, and the Energy Policy and Conservation Act, 42 U.S.C. (& Supp. V) 6201 *et seq.*

[9] The court of appeals stayed the effectiveness of the new policy pending completion of judicial review.

1. All three petitioners assert that the Commission's new policy is precluded by *Drum*. Petitioners ATA and Ryder (ATA Pet. 15-17; Ryder Pet. 8, 9, 11) maintain that *Drum* required shippers leasing from a single source to make the drivers their employees, and immutably defined the "characteristic burdens" as the financial risks of initial investment, loss, depreciation, idleness of equipment, and variable cost increases. Petitioners NARUC and Ryder additionally contend (NARUC Pet. 8-17; Ryder Pet. 9, 10-11) that the new policy violates the requirement, enunciated in *Drum*, that the Commission adopt a practical distinction between for-hire and private carriage because, in petitioners' view, the new policy is not capable of being enforced. These contentions rest on a patently erroneous interpretation of *Drum*.

a. This Court in *Drum* did not, as petitioners suggest, undertake to define the characteristic burdens of transportation, or require continued use of presumptions that all single source leases give rise to for-hire carriage. To the contrary, as the court of appeals correctly recognized (Pet. App. 76a-78a), the Court in *Drum* articulated only general principles to be applied in single source leasing cases, while leaving to the Commission's judgment the task of determining whether in a particular case those principles had been satisfied.[10] Petitioners can point to nothing in *Drum* that suggests that this Court did anything

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[10] Although ATA strenuously contends that the Court clearly confined the Commission to the "burdens" discussed in *Drum*, it nevertheless concedes that "the Commission must determine" where the line is to be drawn (Pet. i) and that "the Commission is permitted some discretion in framing a workable test that is consistent with the objectives of economic regulation" (Pet. 13 (footnote omitted)).

other than affirm an agency exercise of discretion to give meaning to general statutory definitions. Indeed, had the Court in *Drum* actually done what petitioners claim it did, the Court would have engaged in exactly the same unwarranted intrusion into the administrative domain that prompted the Court to reverse the district court's judgment (368 U.S. at 385-386). In short, the court of appeals was correct when it held (Pet. App. 76a) that this Court's prior affirmance in *Drum* of one Commission approach to defining the characteristic burdens of transportation does not preclude the Commission from subsequently adopting another approach that is consistent with the general principles articulated by the Court.

The Commission's new policy is, on its face, entirely consistent with the principles set forth in *Drum*. As the court of appeals correctly held (Pet. App. 78a-81a), although the Commission has now abandoned the presumptions it created under the 1935 Act, the Commission retains the traditional control and substance tests, as well as its commitment to examine all of the circumstances in a leasing arrangement. There is, accordingly, no basis for petitioners' claim that the new policy radically alters the traditional factors bearing on the line drawing process. The basic test remains the same; all that has been changed by the policy statement is the Commission's previous position that single source leases should be presumed to constitute for-hire carriage. Although those arrangements that comply with the Commission's six minimum criteria will now create a presumption in favor of for-hire carriage, the lease arrangements remain, as always, subject to Commission scrutiny in the context of particular cases.

b. The court of appeals properly rejected (Pet. App. 91a) the claims of petitioners NARUC and Ryder that the states would be unable, in actual cases, to enforce the distinction between the two types of service. NARUC argues (Pet. 10, 11) that the new policy can never work because it would require state enforcement authorities to prove violations of law, instead of requiring truck drivers to prove that they are *not* law breakers. In NARUC's view (Pet. 12-13), if a state officer cannot "determine on the spot" whether a purported private carrier is performing illegal for-hire service, state enforcement will "become no more than guesswork." In NARUC's view, administrative and judicial proceedings can work only if unlawful behavior is presumed.

NARUC's fear that state inspection officers will be unable to perform their function of identifying violations of law under the new policy is unfounded. In large measure, NARUC's fear rests upon its erroneous assumption (Pet. 11-13) that oral single source leases will automatically raise the presumption of legitimate private carriage and insulate drivers from further inquiry. But the Commission, in its policy statement, provided sample lease language (Pet. App. 57a-58a) and stated that the presumption arises *only* if the six minimum criteria are embodied in a lease (*id.* at 57a). Moreover, that presumption can be rebutted by a showing that actual operations do not conform to the lease.[11] Because an owner-operator

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[11] Petitioner Ryder claims (Pet. 9) that the new policy will inevitably blur the statutory distinction because the new policy does not require faithful adherence to the lease terms. Ryder has apparently overlooked both the Commission's specific statements (Pet. App. 34a, 41a) that such adherence is

must show that the criteria are satisfied in order to raise the presumption, and because it would be virtually impossible to make such a showing at a road check without a written lease, it would be entirely reasonable for an enforcement officer to require something more than a mere oral assertion of lawful activity from a driver who fails to produce a written lease.[12] Given the exaggerated nature of NARUC's fears, the court of appeals properly decided that actual enforcement cases would provide a much better arena for determining whether, as the Commission believes, the new policy will work in practice.[13]

2. Petitioners ATA (Pet. 10-13) and Ryder (Pet. 12-15) contend that the decision below conflicts with the Fifth Circuit's decision in *Central Forwarding*,

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in fact required, and the court of appeals' citations to those statements (*id.* at 69a, 73a, 91a).

[12] Indeed, the Commission made it clear that it considers a written lease the best evidence of the circumstance of a lease, and it promised to "subject oral leases to more careful and detailed scrutiny than written leases" (Pet. App. 38a).

[13] NARUC also claims (Pet. 12-13) that the new policy will be unworkable because the Commission would permit multiple oral subleasing which would negate the requirement for exclusive shipper control of the leased equipment. In fact, what the Commission said was that trip leasing (which for-hire carriers routinely use without compromising the exclusive control they must exercise over owner-operators) is not necessarily inconsistent with the exclusive control required by the new policy (Pet. App. 34a-35a). The Commission did not endorse trip leasing that would negate the exclusive control requirement.

In any event, should the Commission actually implement the subleasing policy in a manner that effectively eliminates any distinction between for-hire and private carriage, ample judicial remedies are available.

Inc. v. *ICC*, 698 F.2d 1266 (1983). These contentions are without merit. In *Central Forwarding*, the Fifth Circuit reviewed an ICC rule setting the compensation to be paid to owner-operators by regulated carriers. The issue was whether Congress entrusted regulation of labor compensation levels to the ICC. 698 F.2d at 1273. The court held that no substantive provision of the Interstate Commerce Act conferred such regulatory authority, and that the National Transportation Policy (NTP) could not create regulatory authority in the absence of a substantive statutory provision. Thus, as petitioner ATA correctly states (Pet. 10), *Central Forwarding* establishes that the NTP guides the ICC in carrying out its delegated regulatory powers. 698 F.2d at 1284. See also *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83, 87-88 (1957).

Unlike the Commission determination at issue in *Central Forwarding*, an ICC determination concerning whether a particular leasing arrangement is regulated or exempt plainly implements the Act's substantive definitions of the two kinds of service. Indeed, even petitioners concede that such determinations have always been a proper ICC regulatory function (ATA Pet. i, 13, 16; Ryder Pet. 5; NARUC Pet. i, 15-16). Here, because the court of appeals simply held (Pet. App. 90a) that the NTP supports the Commission's view of how best to carry out its regulatory function, there is no merit to petitioners' claims that the court's decision in this case conflicts with *Central Forwarding*.[14]

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[14] Petitioners' claim of a conflict is further discredited by the recent Fifth Circuit decision in *American Trucking Associations, Inc.* v. *ICC*, 722 F.2d 1243 (1984). There, the court relied in part (*id.* at 1251) on the 1980 amendments to

Petitioners claim (ATA Pet. 12-13; Ryder Pet. 14-15), however, that, in any event, the court of appeals erred when it concluded (Pet. App. 89a-90a) that the new policy would be consistent with the NTP because it would enhance competition and in turn foster a healthier regulated and unregulated transportation industry. Petitioners argue that the new policy contravenes the NTP because it will raise owner-operator compensation and thus raise carrier rates. This argument fails because petitioners overlook the fact that the NTP is not solely concerned with rate levels, but seeks also to maintain a sound transportation industry. See 49 U.S.C. (Supp. V) 10101(a)(7) (C), (D) and (F). Because the financial viability of owner-operators indisputably affects "the health and stability of the trucking industry as a whole" (*Global Van Lines, Inc.* v. *ICC*, 627 F.2d 546, 551 (D.C. Cir. 1980)), the court of appeals was correct in holding that the Commission could reasonably conclude that its new policy is consistent with the NTP, even if, as petitioners urge, the NTP applies only to regulated entities.[15]

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the National Transportation Policy in upholding the Commission's decision to abolish a long-standing policy of requiring a showing of "special circumstances" before a rail affiliated motor carrier could qualify for unrestricted motor carrier operating authority.

[15] In fact, there is no merit to petitioners' claim that the NTP applies only to regulated entities. The Commission is charged with promoting a developed and coordinated transportation system. It is difficult to perceive how the Commission could accomplish that task if it were required, as petitioners suggest, to ignore the effects of its regulatory decisions on other large and important (albeit unregulated) segments of the transportation industry. The courts have consistently en-

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

JOHN BROADLEY
General Counsel

ROBERT S. BURK
Deputy General Counsel

LAWRENCE H. RICHMOND
Deputy Associate General Counsel
Interstate Commerce Commission

MARCH 1984

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dorsed the Commission's broader and more reasonable view of the NTP. See, *e.g.*, *Mercury Motor Express, Inc.* v. *United States*, 648 F.2d 315, 319 (5th Cir. 1981).

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